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No. 98-409

In The

Supreme Court of the United States

October Term, 1998

TONYJA DUFFIELD,

Cross-Petitioner,

vs.

ROBERTSON, STEPHENS & COMPANY,

Cross-Respondent.

On Conditional Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CROSS-RESPONDENT'S BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page. While the action below was pending, cross-respondent Robertson, Stephens & Co., through a merger, became BancAmerica Robertson Stephens. Pursuant to Rule 29.6 of the Rules of this Court, cross-respondent states that as of August 31, 1998, it became a wholly owned subsidiary of BankBoston Corporation and is known as BancBoston Robertson Stephens. For convenience's sake, however, the text of this brief in opposition refers to cross-respondent as "Robertson, Stephens." BankBoston Corporation has neither a parent corporation nor any subsidiary which is non-wholly owned or publicly traded.

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Cross-respondent Robertson, Stephens & Company ("Robertson, Stephens") respectfully submits that the conditional cross-petition of Tonyja Duffield ("Duffield") for a writ of *certiorari* should be denied. Duffield has not identified a single case that conflicts with the holding of the court below which found no state action in the New York Stock Exchange's arbitration rules. Unlike Robertson, Stephens' petition in this matter, the conditional cross-petition does not raise an issue that is often-litigated or generally applicable to employers and employees in every industry. Duffield asks this Court to grant the conditional cross-petition solely to resolve a handful of constitutional challenges to securities industry arbitration. Yet even for this limited purpose, the Court's guidance is not required. The Ninth Circuit, like the other courts to consider New York Stock Exchange ("NYSE") or National Association of Securities Dealers ("NASD") arbitration, correctly applied this Court's decisions in holding that mere regulation or approval of a private entity's decision does not subject the private actor to constitutional limitations.

STATEMENT OF THE CASE

A. Duffield's Agreements to Arbitrate.

On March 31, 1982, Duffield filled out by hand and signed a "WORK COPY" of an application form known throughout the securities industry as a Form U-4. (CR 80, SER 616).[1] On April 30, 1982, Duffield applied for registration with the NYSE, among other entities, by signing a typewritten version of the Form U-4. (*Id.*, SER 623). On the last page of each of the 1982 Form U-4's, just above Duffield's signature and under a header

1. "CR" refers to docket number in the court record below, and citations to "ER" and "SER" refer to the specified pages of Appellant's Excerpts of Record and Appellee's Supplemental Excerpts of Record, respectively.

stating "THE FOLLOWING SHOULD BE READ VERY CAREFULLY BY THE APPLICANT," were six numbered paragraphs. (*Id.* SER 622, 626). Paragraph 5 contained Duffield's agreement to

> arbitrate any dispute, claim, or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register . . . (*Id.*)

Duffield passed the Series 7 exam and began working as a securities trader at Piper Jaffray. While at Piper Jaffray, Duffield was told that the NYSE rules were available in the firm's library and was instructed that understanding the NYSE rules was of the utmost importance. (CR 80, SER 614 ¶¶ 6-7, 629, 636). By 1988, Duffield had been promoted to vice president and was the most senior employee on Piper Jaffray's securities trading desk. (CR 1, SER 2 ¶ 7). In June 1988, Duffield, by then a "sophisticated industry insider" (Pet. App. at 78a),[2] left Piper Jaffray to work for Robertson, Stephens.

Duffield completed and signed a new Form U-4 transferring her registration to Robertson, Stephens on June 20, 1988. (Pet. App. at 74a). This Form U-4 was very similar to those she had signed in 1982. The signature page bore the heading, "THE APPLICANT MUST READ THE FOLLOWING VERY CAREFULLY." (CR 78, SER 567). Under the heading and above Duffield's signature were nine numbered paragraphs. Paragraph 1 stated, "I swear or affirm that I have read and understand the items and instructions on this form . . . ." (*Id.*) Paragraph 2 stated:

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2. "Pet. App." refers to the specified pages of the Appendix to Robertson, Stephens' petition for writ of *certiorari*, No. 98-237.

> I hereby apply for registration with the organizations and states indicated in Item 10 [i.e., the NYSE, the NASD, the state of New York and the state of California] . . . and, in consideration of such organizations and states receiving and considering my application, . . . I agree to abide by, comply with, and adhere to all the provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the states and organizations with which I register . . . (*Id.*)

Paragraph 5 stated:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register. . . . (Pet. App. at 10a).

On July 1, 1993, Duffield received a copy of Robertson, Stephens' personnel guide, which contained a provision requiring arbitration of all disputes "arising out of or relating to the termination of any employee's employment . . . including . . . alleged violations of federal, state and/or local statutes." (CR 78, SER 604). Duffield agreed in writing to abide by the provisions of the personnel guide. (*Id.* SER 605).

After almost six years at Robertson, Stephens, during which time she earned more than $1.9 million (*Id.*, SER 563 ¶ 7), Duffield resigned in April 1994 to work at another securities firm. (CR 77, SER 559 ¶ 4).

B. The NYSE and its Rules.

Robertson, Stephens is a member of the NYSE, a private corporation. (Pet. App. at 10a). NYSE Rule 345(a) prohibits member firms from employing anyone as a "securities trader" unless that person is "registered with, qualified by and is acceptable to" the NYSE. (CR 48, SER 111). The NYSE requires candidates for registration to agree to abide by the NYSE Constitution and Rules (CR 76, SER 555) and has required employees of its member firms to arbitrate disputes with their employers since at least 1958.[3] NYSE Rule 347 currently provides:

> Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules. (Pet. App. at 10a).[4]

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3. CR 33, SER 60; *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 121 (1973).

4. The SEC is currently considering an amendment to Rule 347 proposed by the NYSE which would exempt statutory employment discrimination claims from NYSE arbitration. *See* Appendix to Duffield's Brief in Opposition at 1a (No. 98-237); Patrick McGeehan, "Big Board Moves To End Practice On Arbitrations," Wall St. J. at B6 (Sept. 4, 1998). As explained more fully below, the NASD has already adopted changes to its arbitration rules for new claims filed after January 1, 1999. The NASD's new rule, and the NYSE proposal (if adopted), would eliminate any argument by future claimants that they were required as a condition of employment in the securities industry to arbitrate

(Cont'd)

C. Procedural Background.

Duffield filed the present action in federal court on January 11, 1995. The complaint includes claims for breach of contract, fraud and deceit, intentional and negligent infliction of emotional distress, and violations of Title VII and California's Fair Employment and Housing Act. Duffield also sought a judicial declaration that her agreements to arbitrate were not enforceable. (Pet. App. at 12a).

Duffield moved for partial summary judgment on her declaratory relief claim on the grounds that (1) securities industry arbitration violated her rights under Article III and the Fifth and Seventh amendments to the United States Constitution; (2) the arbitration agreement did not adequately protect her rights under Title VII; and (3) the arbitration agreement was not "voluntary" because federal law required her to register with a national securities exchange, thereby subjecting her to mandatory arbitration under exchange rules. The district court denied Duffield's motion for partial summary judgment on the grounds that (1) there was no state action; (2) the securities industry arbitration scheme adequately protects Duffield's Title VII rights; and (3) Title VII does not require that agreements to arbitrate be "voluntary" as Duffield defined the term. (Pet. App. at 68a, 70a).

(Cont'd)
discrimination claims. However, as stated in Robertson, Stephens' reply brief in support of its petition for a writ of certiorari, the broader question of the arbitrability of Title VII and state discrimination claims remains important to employers and employees in the securities industry and other industries nationwide. Even in the securities industry, where arbitration of discrimination claims will no longer be required across the board for new claims filed after January 1, 1999, employers may require individual employees to agree to arbitrate statutory discrimination claims.

Robertson, Stephens moved to compel arbitration under the Form U-4 agreement or, alternatively, the Robertson, Stephens personnel guide. The district court granted the motion, finding that (1) Duffield's agreement to arbitrate was "knowing," and (2) it was not an unconscionable adhesion contract. (Pet. App. at 80a, 82a). The district court certified its orders of March 13, 1997 and August 26, 1996 under 28 U.S.C. § 1292(b) (Pet. App. at 86a), and the Ninth Circuit accepted the appeal. (Pet. App. at 88a).

The Ninth Circuit reversed in part, holding that agreements to arbitrate entered into as a condition of employment were not enforceable as to Title VII and related state statutory discrimination claims.[5] The Ninth Circuit affirmed the district court's finding that the NYSE arbitration requirement did not violate Duffield's constitutional rights on the ground that state action was lacking.

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5. Rejecting this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), which upheld mandatory arbitration of an Age Discrimination in Employment Act claim, the Ninth Circuit found that Congress intended to preclude arbitration of Title VII and related state statutory discrimination claims. Robertson, Stephens filed its petition based on, among other considerations supporting *certiorari*, decisions from other circuits directly contrary to the decision below. *See, e.g., Mouton v. Metropolitan Life Ins. Co.*, 147 F.3d 453 (5th Cir. 1998); *Seus v. John Nuveen & Co.*, 146 F.3d 175 (3d Cir. 1998).

REASONS FOR DENYING THE CROSS-PETITION

I.

THE NINTH CIRCUIT'S REJECTION OF DUFFIELD'S CONSTITUTIONAL CHALLENGE DOES NOT CONFLICT WITH ANY OTHER CIRCUIT COURT DECISION AND IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

A. Duffield Has Not Identified A Court at Any Level That Found State Action in the NYSE or NASD Arbitration Rules.

In contrast to the square conflict of authority cited in Robertson, Stephens' petition, *see* Pet. at 9, Duffield's conditional cross-petition fails to identify a single decision of a United States court of appeals or this Court that conflicts with the finding below that the NYSE arbitration requirement was private, not state, action. Duffield cites two cases in the cross-petition that supposedly "cannot be reconciled" with the decision below. Cross-Pet. at 16. Duffield artfully avoids stating that the cases pose a square conflict, or any conflict at all, because both are factually distinguishable. One case cited by Duffield — *R.J. O'Brien & Associates, Inc.*, 64 F.3d 257 (7th Cir. 1995) — in fact *supports* the decision below. *R.J. O'Brien* dealt with the National Futures Association ("NFA"), which was required by Congress to register *all* participants in the commodity futures industry. *See id.* at 262. The NYSE, by contrast, does not have an express federal mandate to register all participants in the securities industry, but is merely one of several private national exchanges which, along with a national securities association such as the NASD, is permitted to register brokers and dealers. *See* Cross-Petition Appendix at 3a ("Cross-Pet. App.") (15 U.S.C. § 78o). Finally, *R.J. O'Brien* ultimately supports the result, if not the reasoning, of the Ninth Circuit

below. The Ninth Circuit concluded that there was no constitutional violation because there was no state action. *R.J. O'Brien* reached the same result on the ground that the NFA's mandatory arbitration provision did not violate due process. *See* 64 F.3d at 262-63.

Blount v. Securities and Exchange Commission, 61 F.3d 938 (D.C. Cir. 1995), *cert. denied*, 517 U.S. 1119 (1996), the other case Duffield cites as supposedly inconsistent with the decision below, is distinguishable in that it dealt with the rules of the Municipal Securities Rulemaking Board ("MSRB"), an entity Congress created for the express purpose of regulating municipal securities broker-dealers. *Id.* at 941; 15 U.S.C. § 78o-4(b). *Blount* does not concern private organizations such as the NYSE. Nor does it discuss the issues of mandatory registration or arbitration. In any event, *Blount* could not in its ultimate conclusion be inconsistent with the decision below because, like *R.J. O'Brien*, *Blount* found no substantive constitutional violation. *See Blount*, 61 F.3d at 944-49.

Every decision addressing the issue in Duffield's cross-petition — the constitutionality of NASD or NYSE arbitration — uniformly concludes that such arbitration lacks state action. Only one other United States Court of Appeal has addressed the issue. Without issuing an opinion, the Fourth Circuit United States Court of Appeals affirmed a district court finding that the NASD as the sponsor of an arbitration forum is not "a state actor that would entitle the plaintiff to prosecute a claim for civil rights relief." *Shrader v. National Ass'n of Secs. Dealers, Inc.*, 855 F. Supp. 122, 124 (E.D.N.C. 1994), *aff'd without opinion*, 54 F.3d 774 (4th Cir. 1995).[6] The district courts that

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6. Other circuit courts have found no state action in private arbitration. *See, e.g., Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1191 (11th Cir. 1995) ("state action element of a due process claim is absent in private arbitration cases").

have addressed the issue agree. *See Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1466 (N.D. Ill. 1997) (NASD arbitration requirement is not state action); *Bahr v. National Ass'n of Sec. Dealers, Inc.*, 763 F. Supp. 584, 588-89 (S.D. Fla. 1991) (same as *Cremin*); *First Heritage Corp. v. National Ass'n of Sec. Dealers, Inc.*, 785 F. Supp. 1250, 1251 (E.D. Mich. 1992) (same as *Bahr* and *Cremin*).[7]

In a related context, this Court observed in *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 135-36 (1973):

> To begin with the obvious, there is nothing in the [Securities Exchange] Act and there is no [Securities and Exchange] Commission rule or regulation that specifies arbitration as the favored means of resolving employer-employee disputes.

Thus, this Court concluded, arbitration was not a federal rule for purposes of preemption under the Supremacy Clause. *Id.* That observation remains as true today as it was 25 years ago — a fact which is fatal to Duffield's constitutional claim.

Duffield has similarly failed to identify any conflict between the decision below and any decision of this Court. Duffield merely cites cases in which, on plainly different facts, this Court found state action. *See, e.g., Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 615 (1989) (federal agency's

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7. NASD and NYSE actions in enforcing rules outside of the arbitration context have similarly been found to be private, not state, action. *See United States v. Solomon*, 509 F.2d 863, 868-69 (2d Cir. 1975) (NYSE's requirement that member answer questions about alleged rule violations under threat of expulsion from NYSE is not state action); *Datek Sec. Corp. v. National Ass'n of Sec. Dealers, Inc.*, 875 F. Supp. 230, 234 (S.D.N.Y. 1995) (NASD's prosecution of disciplinary action against member firm and employees of member firm is not state action).

regulations that show its "strong preference for [drug] testing" transforms private railroad's drug testing into state action).

Duffield argues that the Ninth Circuit erred in failing to appreciate that the SEC "has repeatedly exercised its oversight authority with respect to the exchanges' mandatory employment arbitration rules." Cross-Pet. at 17. However, the appropriate inquiry is not whether certain arbitration procedures were attributable to the SEC, but whether the requirement to arbitrate itself should be deemed the choice of the state. As the Ninth Circuit stated:

> Duffield has pointed to numerous instances of the SEC's oversight and development of the exchanges' arbitration rules and procedures, but she has failed to put forth any example of governmental encouragement or endorsement of the compulsory arbitration requirement itself.

Pet. App. at 55a. Duffield cannot deny that the NYSE has required its members and their registered employees to arbitrate employment disputes since at least 1958, well before the SEC had jurisdiction over the securities exchanges' arbitration rules. Pet. App. 67a-68a.

B. The Ninth Circuit Opinion Rejecting The Constitutional Challenge To Securities Arbitration Is Correct.

The district court and Ninth Circuit properly applied this Court's state action decisions in rejecting Duffield's constitutional challenge to securities industry arbitration. It is axiomatic that constitutional protections "do not extend to 'private conduct abridging individual rights.' " *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (quoting *Burton v. Wilmington Parking Authority*, 365 U.S. 715,

722 (1961)). As the Ninth Circuit stated in the opinion below, constitutional standards apply in this case only if the securities exchanges' arbitration rules are " 'fairly attributable' " to the state. Pet. App. at 49a (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 936 (1982)).

The district court and Ninth Circuit found state action lacking for several reasons. First, no federal law or regulation in 1988, when Duffield was hired, required her to register with a securities exchange. Pet. App. at 50a, 63a. Second, the SEC has not encouraged or required the securities industry's arbitration rules. *Id.* at 53a. Third, resolving employment disputes is not an exclusive governmental function. *Id.* at 55a. In any event, even if there were state action, securities industry arbitration is unquestionably constitutional.

1. *The decision below correctly found no state action.*

Duffield does not dispute, as the Ninth Circuit found, that when she signed the Form U-4 "no federal statute or regulation required [her] to register with the securities exchanges, much less to sign Form U-4 or to arbitrate employment disputes." Pet. App. at 50a. She attempts to argue around this fact by constructing a daisy chain of state and private rules: the NYSE rules required arbitration of employment disputes with exchange-registered employees; NYSE rules required Duffield to register; and federal law required the NYSE to enforce its rules. Therefore, according to Duffield, federal law required her to arbitrate. *See* Cross-Pet. at 15. The Ninth Circuit rejected this faulty syllogism because it was nonetheless "a NYSE rule, rather than any federal mandate" which was responsible for the challenged action. Pet. App. at 51a n.19.

The private source of the securities industry's arbitration rules is demonstrated by recent changes and proposed changes

to the arbitration requirement regarding employment discrimination disputes. The NASD adopted an amendment to its rules (subsequently approved by the SEC) effective for new claims filed after January 1, 1999, which exempts statutory employment discrimination claims from mandatory arbitration. *See* NASD Notice to Members 98-56 (July 1998).[8] The amended NASD rule permits employers and employees, apart from the Form U-4, to enter into mandatory agreements to arbitrate statutory discrimination claims in the NASD arbitral forum. *Id.*

The NYSE in September 1998 proposed amendments to its arbitration rules which differ in significant respects from the NASD rules change. The NYSE proposal, which has not been approved by the SEC, would prohibit arbitration of statutory discrimination claims in the NYSE forum unless the employer and employee had agreed after the dispute had arisen to arbitrate the claim. *See* Patrick McGeehan, "Big Board Moves to End Practice On Arbitrations," Wall St. J. at B6 (Sept. 4, 1998). Nothing in the proposal would prevent employers from entering into separate agreements to arbitrate discrimination claims in another forum. Under both the recent NASD amendment and the NYSE proposal, members and their employees must still arbitrate common law claims, such as breach of contract, and statutory claims other than discrimination claims. The proposed and recently approved changes to securities industry arbitration rules reflect distinct alternatives, put forward separately by the private exchanges, rather than a lockstep response mandated by the federal government.

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8. The NASD Notice to Members may be viewed on the NASD Regulation website, www.nasdr.com.

2. *Contrary to Duffield's assertion, the Ninth Circuit did not find state action for plaintiffs who signed Form U-4's after 1993.*

Duffield's second argument for state action posits that federal law after 1993 required her to remain registered with an exchange, and thus subject to the exchange's arbitration rules. Cross-Pet. at 19. In advancing this argument, however, Duffield fundamentally misconstrues *dicta* in the decision below. Contrary to cross-petitioner's assertion, the court below did not state that "if plaintiff had signed her Form U-4 *after* 1993, the exchange's mandatory arbitration rules *would* constitute state action." Cross-Pet. at 13. Duffield here confuses two distinct exchange provisions which the Ninth Circuit addressed separately: the registration requirement and the agreement to arbitrate. The Ninth Circuit stated in *dicta* that after 1993, the *registration requirement* " 'constitutes government action of the purest sort.' " Pet. App. at 51a (quoting *Blount*, 61 F.3d at 941). However, as the Ninth Circuit noted, "[i]nsofar as Duffield argues that the 'challenged action' is the requirement that she actually arbitrate her lawsuit, that requirement is found in her private contract, not in federal law." Pet. App. at 52a. The court below went on to explain that,

> the SEC has not exercised sufficient influence over the compulsory arbitration requirement in Form U-4, the NASD procedures, or NYSE rules to deem that requirement the choice of the state.

Pet. App. at 53a. Rather, "the SEC has only acquiesced to NASD's and NYSE's mandatory arbitration rules." *Id.* at 52a n.20. Based on these facts, the Ninth Circuit and district court faithfully and properly applied the holdings of this Court's decisions in *Blum v. Yaretsky*, 457 U.S. 991 (1982), and *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), which instruct

that government regulation, even if pervasive, does not convert private deeds into state action.

3. *Duffield's constitutional claim fails on the merits as well.*

Based on the lack of state action, the courts below looked no farther. Duffield's challenge, however, fails on the ultimate merits as well. Duffield's arbitration agreement does not violate Article III, the Seventh Amendment, or due process. Article III "does not confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986). The *Schor* case involved a government agency's requirement that commodity futures brokers arbitrate customer claims against them. *Id.* at 836. Rejecting an Article III challenge, this Court described the arbitration scheme in the commodity futures industry as "of unquestioned constitutional validity" and also required arbitration of related common law claims. *Id.* at 856.

Similarly, in *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), this Court rejected an Article III challenge to Congress's enactment of a regulatory scheme for the pesticide industry requiring binding arbitration of federal rights. *Id.* at 589. As these cases show, the government is free to require mandatory arbitration of state or federal rights. Thus, in the present case, even if there were state action, no violation of Article III occurred as a result of the NYSE requiring arbitration.

Duffield cannot avoid the fact that her agreement to arbitrate constituted a valid waiver of any right to have her claims decided in an Article III court. *See Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 543 (9th Cir.) (en banc) (Article III rights are subject

to waiver), *cert. denied*, 469 U.S. 824 (1984). Duffield's sole argument against finding a valid waiver of her Article III rights is that the arbitration agreement was a federally compelled condition of employment. Cross-Pet. at 20. Although the premise of this argument is erroneous — her agreement to arbitrate was *not* federally compelled — it fails regardless. In *Geldermann, Inc. v. Commodity Futures Trading Comm'n*, 836 F.2d 310 (7th Cir. 1987), *cert. denied*, 488 U.S. 816 (1988), the Seventh Circuit enforced a firm's agreement to comply with federally imposed arbitration rules despite plaintiff's objection that it had not waived its right to an Article III forum. *Id.* at 317-18. Relying on the Supreme Court decision in *Thomas*, the court held that

> the district court's finding that if [the firm] was to continue in business, it had no choice but to accept the [rules at issue] has no impact on the question of [the firm's] consent to follow all of the rules . . . , including the arbitration rules.

Id. at 318.

The failure of Duffield's Article III argument is also fatal to her jury trial claim under the Seventh Amendment. Duffield concedes, as she must, that her Seventh Amendment right to a jury trial is subject to waiver. Cross-Pet. at 20-21; *see also United States v. Moore*, 340 U.S. 616, 621 (1951). Further, it is fundamental that "[i]n a non-Article III forum the Seventh Amendment simply does not apply." *Geldermann*, 836 F.2d at 323; *see also Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53-54 (1989) (right to jury trial is inapplicable in forum with which jury would be incompatible); *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1155 n.12 (5th Cir. 1992) ("Seventh Amendment does not preclude 'waiver' of the right to a jury trial through the signing of a valid

arbitration agreement"), *cert. denied*, 506 U.S. 1079 (1993). Because Duffield's arbitration agreement was a valid waiver of an Article III forum, the Seventh Amendment is simply not implicated.

Finally, Duffield argues that requiring her to arbitrate violates her due process rights under the Fifth Amendment. Due process does not require, as Duffield seems to suggest, a constitutional right of access to the courts. *See Hardware Dealers' Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 159-60 (1931) (rejecting due process challenge to mandatory arbitration of certain disputes between fire insurers and their insureds); *Lyeth v. Chrysler Corp.*, 929 F.2d 891, 896 (2d Cir. 1991) (rejecting due process challenge to mandatory arbitration of claims against auto manufacturer under New York's "Lemon Law"). Without citation to a single authority, Duffield relies on a supposed due process right "to have her statutory claims decided by a tribunal that is required to apply pertinent statutes and case precedents." Cross-Pet. at 21. This argument ignores the district court's finding, which was not addressed by the Ninth Circuit, that the arbitral forum would adequately protect Duffield's Title VII rights. Pet. App. at 70a. The argument must fail, moreover, in light of this Court's recognition that NYSE arbitration procedures are fair, adequate, and fully capable of vindicating important statutory rights. *See Gilmer v Interstate/ Johnson Lane Corp.*, 500 U.S. 25, 30-32 & n.4 (1991); *Shearson/American Express v. McMahon*, 482 U.S. 220, 231-32 (1987).

II.

THE CROSS-PETITION DOES NOT RAISE AN ISSUE OF FAR-REACHING SIGNIFICANCE.

Duffield seeks a writ of *certiorari* in this Court in order to "fully resolve" her interrelated challenges to mandatory securities industry arbitration. Cross-Pet. at 9. At a minimum, this issue is premature for review in this Court because only one other United States Court of Appeals has so far considered the constitutionality of NYSE or NASD arbitration, and the conclusion in that circuit was consistent with the opinion below. *See Shrader v. National Ass'n of Secs. Dealers, Inc.*, 855 F. Supp. 122, 124 (E.D.N.C. 1994), *aff'd without opinion*, 54 F.3d 774 (4th Cir. 1995). Moreover, this cross-petition comes at a time when the securities industry arbitration requirement is in flux. Duffield concedes, as she must, that her constitutional challenge applies *only* to securities industry arbitration. Yet with the recent amendment to the NASD rules, it is no longer the case that mandatory arbitration of discrimination claims is, in Duffield's words, "a non-negotiable condition of employment if Ms. Duffield wished to continue working . . . for any securities firm." Cross-Pet. at 19. Clearly, in years to come, constitutional challenges to securities arbitration will become even less frequent than they already are, although mandatory arbitration will continue in that industry through individual agreements between employers and employees.

By contrast, arbitration is on the rise outside of the securities industry. *See generally* briefs *amici curiae* in support of Robertson, Stephens' petition submitted by the Chamber of Congress of the United States, the Equal Employment Advisory Council and The Employers Group. The question raised by Robertson, Stephens' petition for writ of *certiorari* — whether agreements to arbitrate Title VII and related state statutory

discrimination claims are enforceable under the Federal Arbitration Act — affects employers and employees in every sector of the economy.

As stated in Robertson, Stephens' petition and the briefs of amici curiae in support of the petition, the Ninth Circuit's decision below burdens thousands of employers with operations both inside and outside the Ninth Circuit. Contrary to the pro-arbitration policies of the Federal Arbitration Act, employers inside the Ninth Circuit are deprived of the benefit of their agreements to arbitrate. Employers and employees within the Ninth Circuit will be forced in many cases into bifurcated proceedings — arbitration of common law claims and parallel court litigation of statutory claims. Nationwide employers are in the difficult position of either excluding employees within the Ninth Circuit from arbitration or bearing the added cost and delay of arbitration *and* litigation, often in the same case. The decision below thus creates inefficiencies affecting the resolution of employment disputes nationwide. Duffield simply cannot point to any comparable exigent circumstances regarding her constitutional challenge to securities industry arbitration.

CONCLUSION

For all of the foregoing reasons, the conditional cross-petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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